

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED AUG 26 1970

Nathan J. Paulson
CLERK

GREYHOUND COMPUTER CORPORATION

- v -

C-E-I-R, INC.

Appellant

Case No.
23647

PETITION FOR REHEARING

PETITION

Greyhound Computer Corporation ("Greyhound"), appellee in the above named action, hereby petitions the Court for a rehearing of its cause pursuant to the Federal Rules of Appellate Procedure, Rule 40, due to the oversight and misapprehension of certain material points of law and fact as hereinafter specified.

MEMORANDUM

I. Decision of the Court

This cause was argued before Circuit Judges Wright, Leventhal, and Wilkey on June 30, 1970. Summary judgment for Greyhound (Lessor) by the District Court was vacated, and the cause remanded for entry of summary judgment for C-E-I-R (Lessee) on July 29, 1970. The court decided that the substantially lower

"first renewal year" lease rents 1/ rather than the "initial term" rents applied to the five months Lessee kept equipment beyond the initial term.

The Court correctly realized that the Lessee's case depended entirely upon a finding of either: (1) "automatic renewal" by inaction, or (2) characterization of the contract as a "full payout" lease, and inference from this that any rental obligation whatsoever beyond the first five years must be at "renewal year" rents.

The Court correctly refused to find "automatic renewal" by inaction, since: (1) the cases upon which Lessee depended in support of this theory were entirely inapposite (Appellee's Brief, page 12, n. 11); (2) neither the "renewal" 2/ nor the "termination" 3/ provisions of the contract support Lessee's "automatic renewal" theory, and; (3) the continued rental obligation in the termination provisions which is defined in Article II of the Lease Agreement to be an extension of the initial term, totally precludes such remote inference. The Court appears to have based its decision rather on characterization of the lease as a "full payout" lease and inferences and

1/ Exhibits B, C, D, Joint Appendix, Pages 16-29.

2/ See Exhibit B attachment B, Joint Appendix pages 19-20.

3/ Ibid. Exhibit E(3), Joint Appendix, page 30 (Letter Agreement).

equities which can be drawn from such characterization.

II. Material Points of Law and Fact Overlooked or Misapprehended.

The Court, by characterizing the contract as a "full payout" lease ^{4/} and inferring that any rental obligation whatsoever beyond the first five years must be at lower "renewal year" rents has overlooked or misapprehended the following material facts or points of law, each sufficient to alter the outcome of the case:

A. Since the Court did not find "automatic renewal" by inaction, the "Letter Agreement" (Exhibit E, Joint Appendix, page 31), on which the Court puts considerable emphasis, is not relevant to the determination of the rent rates applicable to the additional 5 months rental obligation. Article II of the Lease Agreement, and not the Letter Agreement ^{5/} clearly governs the rental rate. While the "Letter Agreement" fixed the period of the lease, and liberalized the duration of Lessee's continuing rental obligation, it in no way changed application of initial term rents to this rental obligation as explicitly provided in

^{4/} Opinion of the Court, page 3, ". . . the high rent specified for the initial five-year term has served to assure the Lessor the return of its capital investment plus a profit. . . ."

^{5/} See Point II B. infra.

Article II of the Lease Agreement entitled "TERM, RENT, AND PAYMENT," ("If any such term be extended. . . all provisions of this agreement shall apply during and until the expiration of said extended period.") The language of the Letter Agreement neither explicitly states nor even implies a reduction of initial term rents for the 5 month rental obligation. It merely created for the Lessee an "option to terminate" which could neither create automatic renewal nor alter the explicit rent clause of Article II. ^{6/} Moreover, Lessee designed this Letter Agreement solely to relieve itself of its prior "open-ended" continuation of rental obligation at initial term rents; and it would be absurd to assume that Lessee would give such valuable consideration as it did, to achieve in part a lowering of rents for a term extended beyond the 5th year without explicitly stating so. Neither this agreement, nor any other provision of the Lease could change by inference the initial term rents for a continued rental obligation provided for in Article II, for Article II clearly states that such change must be "specifically provided in this

^{6/} See Corbin on Contracts, §265, p. 531 (1963) "The 'option to terminate' does, indeed, give to a party a choice between terminating and not terminating; but it creates no power of acceptance, a power to consummate a new exchange."

agreement." [Emphasis added] The Court's dependence on inferences and outside evidence is directly contrary to this provision.

Further, the Court, in essence deciding that the "equities" of this lease should prevent Lessee from paying the higher initial term rents for the additional five months, overlooks the fact that Lessee had complete control of the termination date under the "Letter Agreement" and created its own extended obligation. Lessee gave notice on March 28, 1968, and chose to terminate five months hence. Had it chosen to give notice on December 2, 1967, terminating 120 days hence it would have had no extended obligation; instead it waited until March 28, 1968, creating a 5 month extended rental obligation. The Court in its decision employs an equitable ratio decidendi to rescue Lessee from its own bad business decision--its self-created "inequities."

B. The Court in finding for Lessee overlooked express provisions of the lease for "continued" and "further" rental obligation provided for in the context of the initial term and governed by Article II's provisions for TERM, RENT, AND PAYMENT. Each of the

Equipment Lease Schedules 7/ with identical "Termination" clauses provides in the crucial second paragraph:

The lessee may also give notice of termination during the initial term. Rental will, however, continue until. . . [emphasis added].

This "continued" rental is carried into the "Letter Agreement" construing the second paragraph where such "rental obligation" is given a specific term. Article II of the Lease Agreement states with explicit clarity:

II TERM, RENT, AND PAYMENT...If any such term be extended, the word "term" or "period," as used in this agreement, shall be deemed to refer to the extended term, and all provisions of this Agreement shall apply during and until the expiration of the said extended period, except as may be otherwise specifically provided in this agreement or in any subsequent written agreement of the parties. [Emphasis added].

The initial term rents apply to an extended term. If this is not the case it must be "specifically provided." In stark contrast to the parts of the contract the Court relies on for applying renewal year rates to the additional five months, the latter requirement--that any rent change be specifically provided for--is carried out in the Lease Schedule "Renewal" clauses

which state:

. . . the lessee has the option to renew the lease on a year-to-year basis at the rental shown on the Pro Forma Equipment Lease Schedule. [Emphasis added]

No renewal, of course, took place, and nowhere else in the contract are the lower rates "specifically provided."

Basic contract law requires that the express language of the contract should first and foremost govern. As this Court said in Green v. Obergfell, 121 F 2d 46, 59 (1941):

Generally speaking, the cardinal rule of interpretation is to ascertain, if possible, from the instrument itself the intention of the parties, and to give effect to that intention.

C. Finally, the Court misapprehended that the "plain and discernable intention" of the parties was that rents are governed by the "full payout" nature of the contract. This was found despite the fact that the contract provides exactly the contrary, and despite the fact that this is not specifically provided for anywhere in the contract nor discernable from the language of the contract. Moreover, beyond the contract, Lessee and Lessor's actions manifest the intent that initial term rent would apply to an extended term. Lessee took action in the "Letter Agreement" to prevent

an "open-end" continuing obligation; neither Lessee nor Lessor, after "specifically providing" for lower rates for renewal, anywhere specifically provided for any other rent whatsoever except Article II's provision that initial rents apply to an extended initial term; and in Exhibit O (Joint Appendix, page 62) dated March 15, 1968, well before the termination action of Lessee on March 28, Greyhound expressly showed its intent that initial term rents would apply if there was no renewal. It is impossible to find in light of the above issues overlooked or misapprehended by the Court that the "plain and discernable intention" of the parties was unconditional reduction of initial term rents at the end of five years, and application of "renewal year" rents without renewal.


CONCLUSION

The express language of the contract and the actions of the parties show that their intent was for initial term rents to apply to an extended initial term such as the 5 months here, and that only with affirmative renewal would "renewal year" rents apply. Since no renewal occurred, the Court's summary judgment for Lessee is at variance with the facts presented, with contract law, and with this Court's prior decisions.



The Court's decision for Lessee should be reconsidered, and reversed, with the District Court's summary judgment for Lessor reinstated. Or, alternatively, this cause should be remanded to the District Court for further hearings and findings on the intent of the parties if the Court feels Lessee's arguments still raise controverted issues of fact.

Respectfully submitted,



Andrew J. Kilcarr
1819 H Street, N.W.
Washington, D. C. 20006

Attorney for Appellee
Greyhound Computer Corporation